

RRC2 – Rule 5-210 [3.7]
E-mails, etc. – Revised (May 3, 2016)
Drafting Team: Cardona (Lead), Chou, Inlender, Stout

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April 28, 2016 OCTC Memo to RRC2:

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F. Rule 5-210 [Member as Witness]

Please see OCTC's March 25, 2016 comment.

March 25, 2016 OCTC Email to RRC2:

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L. Rule 5-210 [Member as Witness]

Rule 5-210 should apply to non-jury trials as well as jury trials. (See *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1209 [The roles of an advocate and of a witness are inconsistent. The function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively. "Most of the difficulties inherent in an attorney's taking on the role of both advocate and witness are present regardless of whether the attorney's testimony will be given in front of a jury or a judge."].)

April 29, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

Your draft is a major improvement over the current California rule. However, I am not clear on how the client's consent under paragraph (c)(3) protects the trier of fact from being misled or the opposing party from being prejudiced depending on the issues in the case and the importance of the advocate-witness's testimony. I assume we would have concerns if a prosecutor were allowed to testify at trial or at sentencing simply with the consent of the head of the office. (see, e.g., *United States v. Edwards*, 154 F.3d 915 (9th Cir 1995) – advocate-witness rule protects against the possibility that jurors may be unduly influenced by prestige and prominence of prosecutor's office and base credibility determination on improper factors; rule also reflects broader concerns for public confidence in the administration of justice); *People v. Donaldson*, 93 Cal. App. 4th 916 (2001) – defense counsel's failure to object to prosecutor's testimony to impeach witness constituted ineffective assistance of counsel).

The tribunal has the discretion to disqualify counsel who desires or ought to testify, notwithstanding the client's consent, where detriment to the other side or injury to the integrity of the judicial process is shown. *Lyle v. Superior Court*, 122 Cal. App. 3d 470 (1981). Paragraph (c)(3) addresses the conflict issues between the advocate-witness and the client but not the potential prejudice to the tribunal and the opposing side.

May 1, 2016 Kehr Email to Stout:

If your schedule doesn't permit you to attend the next Commission meeting, I would very much like to know your thinking about the expansion to include bench trials and the pros and cons on p. 5 of 9 of the Report. This certainly will wait if you are going to be there to express your own views. Thank you.

May 2, 2016 Cardona Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I do not disagree with the points made by Mark in his email below. It seems to me, however, that the issues he addresses (a) would require a shift to the ABA standard which (putting aside the special circumstances in sections (i) and (ii) of the rule) bars testimony unless

“disqualification of the lawyer would work substantial hardship on the client” and in doing so, by focusing so much on the impact on the opposing party and trier of fact, seems to be overbroad in limiting the ability of a client and lawyer to jointly determine that it is in their best interests to seek to have the lawyer testify; and (b) are more appropriately dealt with through the court’s discretion to disqualify counsel who seeks to testify (even with client consent), which puts the focus on protecting the trier of fact and opposing counsel not on the lawyer and client, but on the court, where it seems more appropriately to rest. Accordingly, I believe that as a disciplinary rule we remain better focusing on the client-protection goals to which it appears the current California rule, like our draft (which opts for California’s “informed written consent” standard), is directed. I would not be averse, however, to a comment making clear that courts retain discretion to disqualify a testifying lawyer even where the terms of this rule are satisfied, citing *Lyle v. Superior Court*. Perhaps something along the lines of the following: “Courts retain discretion to disqualify a lawyer who seeks to both testify and serve as advocate, notwithstanding the client’s informed written consent. See, e.g., *Lyle v. Superior Court*, 122 Cal. App. 3d 470 (1981).” Thoughts?

May 2, 2016 Stout Email to Kehr, forwarded to Drafting Team & Tuft, cc Difuntorum, Mohr & A. Tuft:

Thank you for the inquiry. I do plan to attend the May meeting, but just in case...some quick thoughts. (I just spoke with Robert, and with his permission I’m forwarding this e-mail to the drafting team and Mark Tuft)

I am a strong supporter of expanding the rule to cover bench trials. Acknowledging my personal bias, I agree that judges should be presumed to be sufficiently experienced and sophisticated to distinguish the various roles that a lawyer might play in a trial. However, having said that, even at a bench trial, there is risk to the client. If the judge at a bench trial does not find the lawyers testimony credible, it could adversely affect the judge’s assessment of the lawyer in his role as an attorney. Moreover, the conflict of interest concerns are equally valid with respect to a bench trial. The testimony of the lawyer, especially on cross-examination, may be in conflict with the client’s position that the lawyer would otherwise assert.

I think we have a typo on page 5 of the Report Recommendation at VIII.A.1. Pros: in the second to the last line... should read “bench” and not “jury” trials. As I know you’re aware, the Model Rule extends to bench trials, and I understand that is true for a majority of jurisdictions.

I am not as convinced that California should retain the option for obtaining informed written consent. As a member of the drafting team I voted in favor of retaining the written informed consent exception, and while I am still of that view, some concerns remain. I am always uneasy whenever a lawyer testifies, and can appreciate the policy considerations underlying the Model Rule. The informed consent exception may sufficiently address the concerns I mentioned above (credibility/conflict), and does acknowledge the importance of a client’s right to be represented by counsel of his/her choice. As alluded to earlier, and as you’ve mentioned, it would appear that the Model Rule comes down with an absolute rule on the side of insuring the integrity of the judicial process (if you will), to the exclusion of the client’s right to counsel of their choice. Remembering our Charter, I am not aware that California’s informed consent exception has caused any problems, such as the tactical disqualification motions mentioned under “cons” on page 5.

If the informed consent exception is retained, the rule may need to be clarified (as Mark has mentioned) with respect to prosecutors in criminal cases.

Some of my concerns are lessened by the fact that the tribunal has the discretion to disqualify counsel under certain conditions. Mark Tuft cited *Lyle v. Superior Court*, 122 Cal.App.3d 470 (1981). Mark has also expressed the view that the rule addresses the "...conflict issues between the advocate-witness and the client but not the potential prejudice to the tribunal and the opposing side." This may warrant further discussion.

May 2, 2016 Stout Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I tend to agree with George, and was also thinking that a comment on this subject would be appropriate.

May 2, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I am not sure the only available option is to disqualify counsel who will or ought to testify on a contested issue at trial. That is why I believe Rule 3.7(b) is an important part of the rule. Another lawyer in the firm may act as advocate or, if the advocate-witness is a sole practitioner, other counsel can be associated in the case to alleviate confusion and prejudice in the proceeding. Client consent would be appropriate in that situation if a conflict arises under Rules 1.7 or 1.9. Also, the Model Rule has an additional exception, not included in our proposed rule, that requires the court to balance the interests of the client and those of the tribunal and the opposing party where disqualification of the lawyer would work a substantial hardship on the client (Model Rule 3.7(a)(3)). Here, again, client consent would be appropriate if the court allows the testimony under this exception. I believe the Model Rule provides sufficient flexibility that the advocate-witness should not be subject to disqualification except when other options are not available.

May 2, 2016 Chou Email to Drafting Team & Tuft, cc Difuntorum, Mohr & A. Tuft:

I am still working through the issues that have been identified but wanted to provide my preliminary thoughts. While I share Mark's concerns about the potential failure to protect the interests of the tribunal, I tend to agree with George's point that the responsibility should be placed on the tribunal who will be well aware that counsel will be testifying as well as the anomalous nature of such testimony. I also tend to believe that clients should have the option to consent to their attorney testifying. Given that the client's ability to do so under current rules has not apparently resulted in significant problems, I am reluctant to eliminate it. That being said, I agree with Mark that tribunals should arguably have more flexibility than disqualification to deal with the situation where an attorney testifies presumably as part of their inherent authority to manage their cases. I am open to including a comment to that effect – which would build upon the comment that George proposed.

May 2, 2016 Stout Email to Drafting Team & Tuft, cc Difuntorum, Mohr & A. Tuft:

I agree with Danny's comments and his suggestion to expand the comment(s) to address Mark's point.